No. 95-199

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

THE NAVAJO NATION,

Petitioner,

vs.

THE HOPI TRIBE and THE UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT THE HOPI TRIBE

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QUESTION PRESENTED

Whether the Ninth Circuit Court of Appeals correctly determined that the Navajo-Hopi Settlement Act, 25 U.S.C. § 640d *et seq.*, allows for an award of prejudgment interest against the Navajo Nation in a suit brought by the Hopi Tribe pursuant to that statute to collect rental payments for Navajo use of Hopi lands.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Citations	iii
Statutory Provisions Involved	1
Statement of the Case	5
Reasons for Denying the Writ	7
I. The Narrow Issue Raised by Petitioner Is of Exceptionally Limited Applicability and Fails to Raise an Important Question of Federal Law.	8
A. The Doctrine of Tribal Sovereign Immunity from Suit Is Not in Dispute and Is Not an Issue Here.	8
B. The Settlement Act Applies Exclusively to Particular Disputes Between Two Indian Tribes.	10
C. The Nation Only Challenges a Particular Application of an Acknowledged Legal Standard.	10
II. The Ninth Circuit's Decision Below Does Not Conflict with, and in Fact Adopts and Applies, Governing Precedent from the Supreme Court, Other Circuits and Its Own Circuit.	11

Contents

	Page
III. The Decision of the Ninth Circuit Is Correct.	13
A. The Settlement Act Waives the Nation's Immunity from the Recovery of Prejudgment Interest.	13
B. The Ninth Circuit's Interpretation Is Consistent with Other Provisions of the Settlement Act.	15
C. The Ninth Circuit's Decision Is Correct on a Number of Alternative Grounds.	16
Conclusion	18

TABLE OF CITATIONS

Cases Cited:

Evans v. McKay, 869 F.2d 1341 (9th Cir. 1989)	12
Franchise Tax Board v. United States Postal Service, 467 U.S. 512 (1984)	15
General Motors Corp. v. Devex Corp., 461 U.S. 648 (1983)	13
Missouri v. Jenkins, 491 U.S. 274 (1989)	17
Partington v. Broyhill Furniture Industries, Inc., 999 F.2d 269 (7th Cir. 1993)	13

Contents

Page

Pegues v. Mississippi State Employment Service, 899 F.2d 1449 (5th Cir. 1990) 17

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) 12

Texas v. New Mexico, 482 U.S. 124 (1987) 17

Statute Cited:

Navajo-Hopi Settlement Act, 25 U.S.C. § 640d, *et seq.* (1988) ..... *passim*

Rules Cited:

Supreme Court Rule 10.1 7

Supreme Court Rule 10.1(a) 13

Supreme Court Rule 10.1(c) 7, 8, 13

Other Authority Cited:

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BRIEF IN OPPOSITION FOR RESPONDENT THE HOPI TRIBE

The Hopi Tribe ("Tribe" or "Respondent") respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's opinion in this case.

STATUTORY PROVISIONS INVOLVED

§ 640d-15. Payment of fair rental value for use of lands subsequent to date of partition

(a) The Navajo Tribe shall pay to the Hopi Tribe the fair rental value as determined by

> the Secretary for all uses by Navajo individuals of any lands partitioned to the Hopi Tribe pursuant to sections 640d-7 and 640d-2 or 640d-3 of this title subsequent to the date of the partition thereof.

25 U.S.C. § 640d-15(a) (1988).

> § 640d-17. Actions for accounting, fair value of grazing, and claims for damages to land
>
> (a) Authorization to commence and defend actions in District Court
>
> Either tribe, acting through the chairman of its tribal council, for and on behalf of the tribe, including all villages, clans, and individual members thereof, is hereby authorized to commence or defend in the District Court an action or actions against the other tribe for the following purposes if such action or actions are not settled pursuant to section 640d-2 or 640d-3 of this title:
>
> (1) for an accounting of all sums collected by either tribe since the 17th day of September 1957 as trader license fees or commissions, lease proceeds, or other similar charges for the doing of business or the use of lands within the joint use area, and judgment for one-half of all sums so

collected, and not paid to the other tribe, together with interest at the rate of 6 per centum per annum compounded annually;

(2) for the determination and recovery of the fair value of the grazing and agricultural use by either tribe and its individual members since the 28th day of September 1962 of the undivided one-half interest of the other tribe in the lands within the joint use area, together with interest at the rate of 6 per centum per annum compounded annually, notwithstanding the fact that the tribes are tenants in common of such lands; and

(3) for the adjudication of any claims that either tribe may have against the other for damages to the land to which title was quieted as aforesaid by the United States District Court for the District of Arizona in such tribes, share and share alike, subject to the trust title of the United States, without interest, notwithstanding the fact that such tribes are tenants in common of such lands: Provided, That the United States may be joined as a party to such an action and, in such case, the provisions of sections 1346(a)(2) and 1505 of Title 28 shall not be applicable to such action.

(c) Further original, ancillary or supplementary actions to insure quiet enjoyment

Either tribe may institute such further original, ancillary, or supplementary actions against the other tribe as may be necessary or desirable to insure the quiet and peaceful enjoyment of the reservation lands of the tribes by the tribes and the members thereof, and to fully accomplish all objects and purposes of this subchapter. Such actions may be commenced in the District Court by either tribe against the other, acting through the chairman of its tribal council, for and on behalf of the tribe, including all villages, clans, and individual members thereof.

(e) Remedies

All applicable provisional and final remedies and special proceedings provided for by the Federal Rules of Civil Procedure and all other remedies and processes available for the enforcement and collection of judgments in the district courts of the United States may be used in the enforcement and collection of judgments obtained pursuant to the provisions of this subchapter.

25 U.S.C. § 640d-17(a),(c),(e) (1988).

STATEMENT OF THE CASE

Between April 18, 1979 and October 31, 1984, individual members of the Navajo Nation ("Nation" or "Petitioner") occupied more than 900,000 acres of the Hopi Reservation on land known as the Hopi Partitioned Lands ("HPL"), using it for homesite, farming, and grazing purposes. This occupation, which continues today and is without the consent of the Tribe, prevents the Tribe from using and enjoying its own land.

Pending the relocation of these Navajo individuals, Congress provided in the Navajo-Hopi Settlement Act ("Settlement Act") that:

> The Navajo [Nation] shall pay to the Hopi Tribe the fair rental value as determined by the Secretary [of the Interior] for all use by Navajo individuals of any lands partitioned to the Hopi Tribe pursuant to sections 640d-7 and 640d-2 or 640d-3 of this title subsequent to the date of the partition thereof.

25 U.S.C. § 640d-15(a) (1988).

Pursuant to this section, the Department of the Interior ("Department") calculated the "fair rental value" owed by the Nation to the Tribe for use of the HPL between April 18, 1979 and October 31, 1984. The Department determined that the Nation owed the Tribe $1,186,190.77 for grazing, $586,803.60 for homesite, and $191,671.14 for farmsite use during that period.

The Nation appealed these rental determinations within the Department to the Secretary of the Interior ("Secretary"). The Secretary affirmed, with minor modifications, the homesite and farmsite rental awards. The Secretary, however, refused to

consider the Nation's appeal of the grazing rental award, finding that it had failed to file a timely notice of appeal as required by Department regulation.

In separate proceedings, the Nation filed actions in the United States District Court seeking review of: (1) the Secretary's affirmation of the homesite and farmsite rental awards, and (2) the Secretary's refusal to consider its appeal of the grazing rental award. Simultaneously, the Tribe filed an action in the district court seeking to enforce these rental awards. The Tribe had previously brought an action seeking declaratory relief that it could recover prejudgment interest on any rental awards. This latter action was consolidated by the district court with the actions seeking review and/or enforcement of the 1979-84 rental determinations.

On July 6, 1992, the district court entered orders: (1) affirming the homesite rental award; (2) affirming the grazing rental award based on the Nation's failure to file timely its administrative appeal (Pet. App. 53); and (3) remanding the farmsite rental award back to the Secretary to analyze further certain issues. The district court also ruled that the Nation's sovereign immunity prevented the Tribe from recovering prejudgment interest on the rental awards (Pet. App. 62).

The Nation filed separate appeals with the Ninth Circuit challenging: (1) the district court's affirmation of the Department's homesite rental determination, and (2) the district court's affirmation of the Secretary's refusal to consider the Nation's challenge of the grazing rental determination.[1] The Tribe cross-appealed, challenging the district court's holding that

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1. Because the district court remanded the farmsite rental award to the Department for further review, that component of the rental award was not appealed to the Ninth Circuit.

the Nation's sovereign immunity precluded an award of prejudgment interest as a component of the rental awards.

The Ninth Circuit Court of Appeals, in a consolidated opinion: (1) affirmed the homesite rental determination (Pet. App. 21-22); (2) reversed the district court's decision that the Nation's appeal of the grazing rental determination was time barred (Pet. App. 29-30); and (3) reversed the district court's denial of prejudgment interest on the rental awards (Pet. App. 37).

In its petition, the Nation challenges only one of the issues decided by the Ninth Circuit: the narrow question of whether the court correctly allowed the Tribe to recover prejudgment interest as a component of the rental awards.

REASONS FOR DENYING THE WRIT

The Court should deny the petition because it fails to present any "special and important reasons" for granting the writ of certiorari as required by Sup. Ct. R. 10.1, and because the Ninth Circuit's decision below was plainly correct.

First, the narrow issue raised in the petition is of exceptionally limited applicability. The question presented is not, as petitioner implies, an issue of importance to all Indian Tribes (Pet. 11). Instead, the issue raised involves a case-specific interpretation of the Settlement Act — a statute that by its own terms applies only to particular land disputes between these two Indian Tribes. As a case of such limited impact, the petition fails to raise an important question of federal law. Sup. Ct. R. 10.1(c).

Second, contrary to petitioner's assertions (Pet. 11-18), the Ninth Circuit's opinion below does not represent a departure

from, or conflict with, any precedent from this Court, from its own circuit, or from any other circuit. In fact, in its decision the Ninth Circuit consistently cites, relies upon, and applies the very precedents that it is alleged to have consciously disregarded (Pet. App. 30-37). The Ninth Circuit's decision, then, does not raise a conflict with any applicable law. Sup. Ct. R. 10.1(c).

Finally, the Court should deny the petition because the Ninth Circuit's decision below is correct. After carefully examining the relevant provisions of the Settlement Act and its legislative history, the Ninth Circuit correctly concluded that the Settlement Act waived the Nation's immunity from the payment of interest in this case. Moreover, as set forth below, even if the Settlement Act did not waive the Nation's immunity from interest, the Ninth Circuit's opinion would have to be upheld on other grounds.

I.

THE NARROW ISSUE RAISED BY PETITIONER IS OF EXCEPTIONALLY LIMITED APPLICABILITY AND FAILS TO RAISE AN IMPORTANT QUESTION OF FEDERAL LAW.

Instead of raising an issue of importance to all Indian Tribes (Pet. 11), the petitioner is forced to concede that the question it presents is quite "narrow" (Pet. 5, 7, 11). The question presented by the petitioner, in fact, is so narrow, case-specific and of limited impact that it fails to raise an important question of federal law. Sup. Ct. R. 10.1(c).

A. The Doctrine of Tribal Sovereign Immunity from Suit Is Not in Dispute and Is Not an Issue Here.

In arguing that certiorari should be granted, the petitioner devotes much of its brief to defending the proposition that, absent an express waiver of its sovereign immunity, it cannot be sued

(Pet. 11-18). This basic and unassailable principle of tribal sovereignty is not, however, at issue here.

In reaching its decision, the Ninth Circuit had to engage in a two-part analysis of the Settlement Act. First, it had to determine whether the Settlement Act waived the Nation's sovereign immunity from this suit. Second, the Ninth Circuit had to decide whether the Settlement Act also contained an additional waiver of the Nation's immunity authorizing the award of prejudgment interest. In its opinion, the Ninth Circuit found that the Settlement Act contained the additional waiver (Pet. App. 33).

Despite all of its argument about general waivers of sovereign immunity, the Nation has not challenged the first part of the Ninth Circuit's analysis. Indeed, it cannot.[2] This renders meaningless a great deal of the Nation's petition (Pet. 11-16), where it repeatedly asserts that its immunity from suit must be expressly and unequivocally waived. This is not and never has been an issue.

Instead, the only issue before the Court (Pet. i) is the Nation's challenge to the second part of the Ninth Circuit's analysis: its finding that the Settlement Act also includes an

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2. In a provision of the Settlement Act that the Nation did not cite to the Court, Congress waived the Nation's immunity from this suit:

> Either tribe may institute such further original, ancillary, or supplementary actions against the other tribe as may be necessary . . . to fully accomplish all objects and purposes of this subchapter [including an action under 25 U.S.C. § 640d-15(a) to collect "fair rental value"]. Such actions may be commenced in the District Court by either tribe against the other. . . .

25 U.S.C. § 640d-17(c) (1988).

additional waiver of the Nation's immunity authorizing an award of prejudgment interest on the rental awards.

B. The Settlement Act Applies Exclusively to Particular Disputes Between Two Indian Tribes.

The petition thus presents a very narrow question of statutory interpretation. Moreover, the statute the Nation asks the Court to construe is one of exceedingly limited applicability. As set forth in the petition and in the Ninth Circuit's decision below (Pet. 5-7, Pet. App. 4-6), the Settlement Act is a specific Congressional response to a unique, longstanding land dispute between the Nation and the Tribe. The Settlement Act does not apply to any Indian Tribe not having an interest in the disputed land.[3] Furthermore, the Settlement Act does not apply to all disputes that may arise between the Nation and the Tribe. It is limited to those disputes involving the 1882 and 1934 Reservations. It is thus a statute of exceptionally limited applicability and is not, as the petition implies (Pet. 11), one of interest to other Indian Tribes.

As a result, any proclamation by the Court in this case regarding the proper interpretation of the Settlement Act would have no effect beyond the limited number of cases brought between the Nation and the Tribe pursuant to the Settlement Act. For this reason alone, the petition fails to raise an important question of federal law.

C. The Nation Only Challenges a Particular Application of an Acknowledged Legal Standard.

Moreover, as set forth in Part II below, in interpreting the

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3. Besides the Nation and the Tribe, only the San Juan Southern Paiute Tribe ("Paiutes") might conceivably be affected by interpretations of the Settlement Act. The Paiutes, however, have never been a party to this particular case.

Settlement Act, the Ninth Circuit applied all of the relevant precedents from this Court, from its own circuit and from all other circuits. The Nation does not dispute this (Pet. 12, 15). Instead, the Nation argues that the Ninth Circuit *misapplied* the governing law in this particular case when it interpreted the Settlement Act as authorizing the award of prejudgment interest on the rental awards (Pet. i, 13).

This is a crucial distinction, as it further demonstrates the narrowness of the petitioner's claim. The Nation does not accuse the Ninth Circuit of creating a new legal standard. Instead, it merely claims that in this particular case, the Ninth Circuit misapplied the legal standard that the Nation itself agrees should govern. Because the Nation can only challenge a particular application of an agreed-upon legal standard in this case — as opposed to the creation of a new legal standard — the Nation has raised a very narrow issue. As such, the Nation has failed to present an important question of federal law.

II.

THE NINTH CIRCUIT'S DECISION BELOW DOES NOT CONFLICT WITH, AND IN FACT ADOPTS AND APPLIES, GOVERNING PRECEDENT FROM THE SUPREME COURT, OTHER CIRCUITS AND ITS OWN CIRCUIT.

The Nation concedes that the Ninth Circuit's decision fails to raise a conflict with any decision from another circuit court of appeals.[4] Instead, the Nation argues that the Ninth Circuit's

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4. Moreover, the chances of there ever being such an inter-circuit conflict are highly remote. All actions between the Nation and the Tribe brought pursuant to the Settlement Act are to be filed exclusively in the United States District Court in Arizona. *See* 25 U.S.C. § 640d(b) (defining "District Court" as used throughout the Settlement Act to be the "United States District

(Cont'd)

decision conflicts with applicable decisions of this Court and with decisions from its own circuit (Pet. 11-18). In particular, the Nation asserts (Pet. 14) that the Ninth Circuit's decision conflicts with this Court's opinion in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) and with the Ninth Circuit's decision in *Evans v. McKay*, 869 F.2d 1341 (9th Cir. 1989). This simply is not the case.[5]

Instead of creating a conflict with these decisions, the Ninth Circuit actually cites, adopts and applies these governing precedents in arriving at its decision. For example, in holding that the Tribe could recover prejudgment interest from the Nation in this case, the Ninth Circuit explained:

> We read the Settlement Act to include a waiver of any tribal interest immunity in terms sufficiently unequivocal to pass muster even under the strict interpretive standard set forth in *Santa Clara Pueblo* and *McKay*.

(Pet. App. 31 n.7).

The Ninth Circuit did not defy the law or announce a new interpretation of it. Instead, it merely applied the governing law

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(Cont'd)
Court for the District of Arizona"). It is thus highly unlikely that a court outside the Ninth Circuit would ever have the opportunity to interpret this provision of the Settlement Act. Without such a ruling, of course, an inter-circuit conflict would be impossible.

5. Even if the Ninth Circuit's decision did conflict with a decision of another panel from its own circuit, this would not justify granting the petition. *See* Robert L. Stern *et al.*, *Supreme Court Practice* § 4.6 (7th ed. 1993) ("Ordinarily, a conflict between decisions rendered by different panels of the same court of appeals is not a sufficient basis for granting a writ of certiorari.").

to interpret the relevant provisions of the Settlement Act. As such, the Ninth Circuit's decision does not create a conflict with this Court's decisions, with the decisions of other circuits, or with decisions from its own circuit. Sup. Ct. R. 10.1(a),(c).

III.

THE DECISION OF THE NINTH CIRCUIT IS CORRECT.

Finally, the Court should deny the petition because the Ninth Circuit's decision below is correct. The Ninth Circuit correctly found that the Settlement Act has waived the Nation's immunity from the recovery of prejudgment interest in this case. Moreover, even if the Settlement Act did not waive the Nation's immunity from interest, the Ninth Circuit's decision would have to be upheld on other grounds.

A. The Settlement Act Waives the Nation's Immunity from the Recovery of Prejudgment Interest.

In the Settlement Act, Congress waived the Nation's immunity from this suit. 25 U.S.C. § 640d-17(c). In waiving the Nation's immunity, Congress also made clear that the Tribe would be entitled to the full range of remedies available — including the award of prejudgment interest.[6]

The Settlement Act provides that:

> All applicable provisional and final remedies

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6. The Ninth Circuit recognized that prejudgment interest "has become a familiar remedy widely recognized by federal courts as a means to make a plaintiff whole against a dilatory defendant." (Pet. App. 33) (citing *General Motors Corp. v. Devex Corp.*, 461 U.S. 648, 655 (1983) and *Partington v. Broyhill Furniture Industries, Inc.*, 999 F.2d 269, 274 (7th Cir. 1993)).

> and special proceedings provided for by the Federal Rules of Civil Procedure and all other remedies and processes available for the enforcement and collection of judgments in the district courts of the United States may be used in the enforcement and collection of judgments obtained pursuant to the provisions of this subchapter.

25 U.S.C. § 640d-17(e) (1988).

Read in context with the other provisions of the Settlement Act, the Ninth Circuit concluded that "Congress unequivocally waived any tribal immunity from prejudgment interest" (Pet. App. 32).

The Ninth Circuit explained:

> This blanket authorization of "all remedies available" in federal district courts necessitates some inquiry into what damages and costs are currently recoverable there. But in requiring this wide-ranging inquiry, the statutory language does not ipso facto render the congressional waiver of tribal interest immunity therein equivocal. Rather than compile an exhaustive list of currently available remedies and add a clause authorizing additional remedies upon their introduction in federal court, section 640d-17(e) reasonably relies on a more general formulation that *accomplishes the same result with equal clarity and far greater efficiency.*

(Pet. App. 33) (emphasis added).

In light of the need to examine the "underlying Congressional policy" of the Settlement Act (Pet. App. 36 (citing *Franchise Tax Board v. United States Postal Service*, 467 U.S. 512, 521 (1984)), and this Court's admonition to avoid a "crabbed construction" of waivers of immunity (Pet. App. 36 (citing *Franchise Tax Board*), the Ninth Circuit's interpretation of the Settlement Act is correct.

B. The Ninth Circuit's Interpretation Is Consistent with Other Provisions of the Settlement Act.

The Ninth Circuit's decision does not, as claimed by the Nation, render the Settlement Act "internally inconsistent" (Pet. 18-21). The Nation focuses on the fact that the payment of interest is required in certain provisions of the Settlement Act, but is not expressly required in § 640d-15(a). Based on this, the Nation argues that this evinces a congressional intent not to allow for interest on the grazing rental award.

As the Ninth Circuit recognized, the Nation's argument fails to take the whole statute into account. In certain sections of the Settlement Act, Congress expressly required the payment of interest. *See* 25 U.S.C. § 640d-17(a)(1); 25 U.S.C. § 640d-17(a)(2). In those provisions, Congress mandated the award of interest because at the time it enacted the Settlement Act, it knew there would be an award, that the award was past due, and that the award would be a liquidated, determinable sum. Congress also knew that it would be easy to determine what amounts were owed for each particular year (Pet. App. 35).

In other sections of the Settlement Act, Congress expressly disallowed the recovery of interest. In § 640d-17(a)(3), for instance, Congress allowed either tribe to recover for any damage inflicted to the land by the other tribe. Congress disallowed the recovery of interest on any such award because even though it knew that damage had occurred, it also knew that precise proof as

to when particular damage occurred and as to how much damage existed at any given time was uncertain (Pet. App. 35).

The Ninth Circuit recognized that 25 U.S.C. § 640d-15(a), the relevant provision in this case, lies somewhere in between. It neither requires nor proscribes an award of interest (Pet. App. 35). Because Congress neither specified nor prohibited prejudgment interest in this section, the Ninth Circuit correctly held that a court has discretion to award it:

> While section 640d-15(a) does not address interest awards, section 640d-17(e) explicitly expresses Congress' intention that, in the event of litigation to enforce or collect a judgment under the Settlement Act, federal courts shall have at their disposal the full panoply of remedies and processes available therein, including prejudgment interest.

(Pet. App. 35-36).

Contrary to the Nation's position, this reading of the Settlement Act is entirely appropriate and does not render the mention of interest in various subparts of § 640d-17(a) "superfluous" (Pet. 20). In certain sections of the Settlement Act, the award of interest is required. In certain sections of the Settlement Act, the award of interest is prohibited. In this case, where the award of interest is neither required nor prohibited, it is within the Court's discretion to award it.

C. The Ninth Circuit's Decision Is Correct on a Number of Alternative Grounds.

Finally, even if the Settlement Act did not waive the Nation's immunity from interest in this case, the Ninth Circuit's decision would still be correct.

First, there may be no need for an additional waiver of the Nation's immunity as to the payment of interest. *See Missouri v. Jenkins*, 491 U.S. 274, 281 n.3 (1989) (noting that special rule requiring an additional waiver of immunity as to interest applies "only where the United States' liability for interest is at issue"); *see also Pegues v. Mississippi State Employment Service*, 899 F.2d 1449, 1454 (5th Cir. 1990) (holding, in light of *Jenkins*, that when Congress waives a state's immunity to suit, it "does not limit the tools with which courts could fashion relief. . . . The award of prejudgment interest is one of those tools"). Hence, the unequivocal waiver of the Nation's immunity from suit in 25 U.S.C. § 640d-17(c) may be sufficient to waive the Nation's immunity from paying prejudgment interest on the rental awards.

Moreover, no additional waiver of immunity as to the payment of interest is required in a case, like this one, where the litigants are equal sovereigns. *See Texas v. New Mexico*, 482 U.S. 124, 132 n.8 (1987) (allowing award of post-judgment interest in an action between two states, without requiring additional waiver as to the payment of interest). The Ninth Circuit's decision is thus justifiable on a variety of grounds.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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